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Probate and Trusts

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This Article reviews legislative and case law developments in the areas of wills, nontestamentary transfers, heirship, estate administration, guardianships, *inter vivos* gifts, and trusts. The Survey period covers decisions published between October 1, 1996, and September 30, 1997, and changes to the Probate Code, the Property Code, and other codes and statutes enacted by the 75th Texas Legislature that affect the areas of probate and trusts.

I. WILLS

A. WILL CONTESTS

In *Sanders v. Capitol Area Council, Boy Scouts of America*,[1] the court held that the trial court improperly granted summary judgment on a basis not included in the motion for summary judgment.[2] The decedent created an irrevocable trust, under the terms of which she was the beneficiary during her lifetime and her daughter, as her only heir, held a successor beneficial interest after the decedent's death. The decedent purported to transfer all of her property to the trust. The trust agreement provided that the decedent had the power to change the interests of the successor beneficiary. The decedent later executed a will in which she left her ranch (which she theoretically transferred into the trust) to charity, a small sum of money to her daughter, and the remainder of her estate to other persons. The decedent also apparently altered the trust agreement by drawing a line through the designation of the secondary beneficiary of the trust and initialling the change. The decedent, however, failed to change the designation of her legal heirs as the remainder beneficiaries or to change the designation of her heirs as the secondary beneficiaries in another article of the trust agreement. Following the decedent's death, the charity attempted to probate the will and the decedent's daughter contested the will. The decedent's daughter also sought, in a separate proceeding, to have the validity of the trust established and a declaration that the trust assets passed to her under the terms of the trust agreement. The charity responded by requesting that the court declare the trust invalid, or, if the court declared the trust valid, that the charity became the secondary beneficiary of the trust through the decedent's execution of her will. The trial court consolidated the actions.

The charity moved for summary judgment based on two theories: (1) that the decedent never transferred the ranch to the trust, so that the charity took the ranch under the terms of the will; and (2) that the decedent exercised her retained power to change the beneficial interest of the secondary beneficiary through the execution of her will. However, the charity did not assert in its motion for summary judgment that the decedent exercised her power to change the beneficial interest of the secon-

1. 930 S.W.2d 905 (Tex. App.—Austin 1996, no writ).
2. *See id.* at 911.

dary beneficiary by drawing the line through the designation in the trust agreement. The daughter objected to the charity's motion for summary judgment and the charity, in its reply, referenced the notation on the trust agreement for the first time. The trial court granted summary judgment for the charity on the basis that the decedent changed the secondary beneficiary by striking out the designation of the secondary beneficiary in the trust agreement, a ground that the charity did not include in its motion for summary judgment. The daughter filed a motion for new trial, alleging that the trial court granted summary judgment on a basis not included in the charity's motion for summary judgment. The trial court overruled the motion and admitted the will to probate. The daughter, in her appeal, again asserted that the trial court granted its summary judgment on a ground not included in the charity's motion. The appeals court found that the charity did not specifically raise the ground on which the trial court granted the summary judgment by merely mentioning the ground in its reply to the daughter's response.[3] The court held that the trial court thus improperly granted the charity's motion for summary judgment.[4]

In *Guthrie v. Suiter*,[5] the court held that fact issues precluding summary judgment existed on the issues of testamentary capacity and testamentary intent,[6] but that no fact issues existed on the issues of undue influence[7] and fraud.[8] The testator lived apart from her two sons for most of their childhood and apparently never became close to one of them. The testator moved to Houston to be close to one of her brothers, who took care of her affairs, some years prior to her death, and she and the brother remained close. The testator left her entire estate in trust for the benefit of one of her sons, who predeceased her, with a remainder to her two surviving brothers. The testator excluded her other son entirely from her will, specifically stating her reason for excluding this son. The testator's son filed the will contest after the court admitted the will to probate and appointed the testator's brother as independent executor. The son alleged in his will contest that the testator did not have testamentary capacity, that she did not properly execute the will, that the executor unduly influenced the testator, and that the executor procured the will by fraud. The son offered the affidavit of a mental health expert concerning his mother's capacity, but the trial court excluded this affidavit because the son failed to attach sworn or certified copies of the documents to which the expert referred in his affidavit as required under Rule 166a(f).[9] The trial court refused to consider two letters attached to the son's affidavit

3. *See id.* The court found that the charity's reply mentioned the decedent's notation on the trust agreement only in support of its contention that the decedent exercised her power to change the beneficial interest through the execution of her will. *See id.*

4. *See id.*

5. 934 S.W.2d 820 (Tex. App.—Houston [1st Dist.] 1996, no writ).

6. *See id.* at 831.

7. *See id.* at 832.

8. *See id.* at 833.

9. TEX. R. CIV. P. 166a(f).

under the ancient documents exception to the hearsay rule.[10] The trial court also refused to consider the copy of the executor's deposition that the son attached to his motion for summary judgment because the son did not direct the court to the pertinent pages of the lengthy deposition. The trial court granted the executor's motion for summary judgment on each cause of action. The appeals court upheld the trial court's rulings on excluding the son's evidence.[11] However, the appeals court found that the son provided some evidence that the testator may not have had testamentary capacity, therefore, the trial court improperly granted summary judgment on the testamentary capacity issue.[12] The son argued that the testator could not form the requisite intent to execute her will. The appeals court again found that a fact issue existed concerning the testator's ability to form the necessary testamentary intent and that the trial court improperly granted summary judgment.[13] The appeals court, however, found that the circumstantial evidence concerning the testator's relationship with her brother did not raise a factual issue concerning undue influence.[14] The appeals court also found that no factual question existed concerning whether the executor fraudulently induced the testator to execute the will by misleading her concerning the contents of her will.[15]

In *In re Estate of McDaniel*,[16] the court held that a will beneficiary could not contest the will after accepting benefits under the will.[17] The testator made several gifts to various individuals in his will, left his son a life estate in some rental property, and left his daughter the residue of his estate. The testator named his daughter as independent executor, and the court admitted the will to probate and appointed the daughter executor. The daughter delivered an executor's deed to her brother, in which she conveyed the life estate in the rental property to him. The son filed the deed and received all of the rents from the property after his father's death. Several months after filing the deed, the son filed a contest of the will, alleging that his father lacked testamentary capacity. The daughter filed two pleas in abatement, alleging that the son's receipt of benefits estopped him from contesting the will and that the son had no standing to contest the will because of estoppel. The trial court sustained the daughter's pleas in abatement and dismissed the contest. The appeals court

10. TEX. R. CIV. EVID. 803(16).

11. *See Guthrie*, 934 S.W.2d at 824-26.

12. *See id.* at 830-31. The son offered evidence of the testator's mental ability from both before and after she executed the will.

13. *See id.* at 831.

14. *See id.* at 832. The court found that circumstantial evidence sufficient only to raise the mere "surmise that the executor unduly influenced the testator" was insufficient to raise a factual question concerning undue influence. *Id.* (citing Mackie v. McKenzie, 900 S.W.2d 445, 450-51 (Tex. App.—Texarkana 1995, writ denied)).

15. *See Guthrie*, 934 S.W.2d at 833. The court found that claims of undue influence and fraud in the inducement actually constitute one claim, so no factual issue concerning fraud existed. *See id.* (citing Holcomb v. Holcomb, 803 S.W.2d 411, 415 (Tex. App.— Dallas 1991, writ denied)).

16. 935 S.W.2d 827 (Tex. App.—Texarkana 1996, writ denied).

17. *See id.* at 830.

affirmed the trial court.[18]

B. Will Construction

In *Montgomery v. Browder*,[19] the court held that a decedent could not transfer the remainder interest in her life estate by will,[20] although the decedent had broad powers of sale and use during her lifetime, and that payments due on a promissory note due subsequent to the decedent's death belonged to the remaindermen.[21] The decedent's sister, in her will, gave the beneficiary a life estate in her property, including the real property at issue in this case. The sister provided that the decedent could use sums necessary for her maintenance and support from the corpus of the life estate and that the decedent would have all of the powers of fee simple ownership except the disposal of the remainder interest. The decedent entered a contract for the sale of certain real estate in which she had a life estate. The consideration for the contract included a cash payment at closing and a promissory note providing for annual interest payments with full principal due within fifteen years of the date of closing. The contract further provided that the decedent would execute a will in which she would forgive the indebtedness owing at her death. The warranty deed, deed of trust and promissory note contained no mention of the forgiveness of the indebtedness. The decedent executed a codicil, which did not qualify for probate in her state of residence at the time of her death, but did purport to forgive the indebtedness. The purchasers never attempted to contact the remainder beneficiaries about purchasing their interests in the property. When the purchasers learned of the decedent's death two years later, they withheld future payments under the note.

The remaindermen sued for the unpaid amounts of the note, foreclosure of the lien under the deed of trust, and other damages. The remaindermen alleged that the purchasers were in default for failing to make payments under the note. The remaindermen argued that the note was a substitute for the real property and, thus, was part of the decedent's life estate, which passed to the remaindermen upon her death. The purchasers argued that the decedent had the right to forgive the note in her will and that her agreement to do so was part of the consideration for the purchase of the property. They also argued that the decedent breached

18. *See id.* at 830. The court held that all of the elements of legal estoppel are not necessary to estop a person from contesting a will under which he has already received benefits. *See id.* at 829-30. The court found unpersuasive the son's argument that he did not know that accepting any benefits under the will would estop him from contesting the will. *See id.* at 829. The court also found unpersuasive the son's argument that the daughter did not detrimentally rely upon his acceptance of benefits under the will. *See id.* at 829-30. The court stated that the only element necessary for estopping a beneficiary from contesting a will is the beneficiary's acceptance of "a benefit under the will of which he could have been legally deprived without his consent." *Id.* at 830 (citing Wright v. Wright, 274 S.W.2d 670, 676 (Tex. 1955)).

19. 930 S.W.2d 772 (Tex. App.—Amarillo 1996, writ denied).

20. *See id.* at 778.

21. *See id.* at 779.

the contract by failing to forgive the debt effectively in her codicil, and that the statute of limitations[22] had expired, giving them title to the property. The trial court granted summary judgment for the remaindermen.

The appeals court first found that the testator granted the decedent broad powers over the life estate property, but that the testator did not give the decedent the absolute right to dispose of the property because she limited the right to invade principal to the decedent's needs.[23] While the decedent had the right to sell the property and use all of the proceeds for her needs during her lifetime, she did not have the right to dispose of the remainder interest by will.[24] The court found that the contract provision forgiving the debt was illegal and the contract was void, although neither the remaindermen nor the purchasers challenged the warranty deed, deed of trust, or promissory note, which made no mention of the forgiveness of indebtedness.[25] The court left "the parties as [it found] them—with a valid warranty deed, deed of trust and promissory note."[26] The court held that the statute of limitations did not apply because the remaindermen sought recovery under the promissory note, which was payable by installments, rather than title to the property.[27] The purchasers, on motion for rehearing, contended that the decedent should have acquired the interests of the remaindermen so that she could convey fee simple title to the property. The court found that the decedent did not agree to acquire the remainder interests, but only agreed to forgive the debt at her death, so the decedent did not breach the contract.[28]

In *Sammons v. Elder*,[29] the court construed a will to determine the testator's intent when she left her "savings account and/or savings certificate" to her two children and the residuary estate equally to her two children and her step-daughter.[30] The decedent had several money market accounts, certificates of deposit, and individual retirement accounts at the time of her death. The children, who served as co-executors of the will, filed an inventory listing all of the accounts and identifying the accounts as checking accounts, money market accounts, certificates of deposit, and individual retirement accounts. The step-daughter contended that none of the accounts were savings accounts or savings certificates that passed to the two children, so that all of the accounts passed equally to the two children and to her. The trial court determined that all but two of these accounts fell within her meaning of "savings account and/or savings certificate" and thus passed to her two children. The trial court found that the other two accounts passed under the residuary clause of

22. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.024 (Vernon 1986).
23. *See Montgomery*, 930 S.W.2d at 777.
24. *See id.* at 777-78.
25. *See id.* at 778-79.
26. *Id.* at 781-82.
27. *See id.* at 780.
28. *See id.* at 781.
29. 940 S.W.2d 276 (Tex. App.—Waco 1997, writ denied). For a discussion of other issues in this case, see *infra* notes 147-50 and accompanying text.
30. *Id.* at 280-82.

the will to the two children and the step-daughter. On appeal, the step-daughter alleged that the trial court incorrectly found that the term "savings account and/or savings certificate" was ambiguous and erred in allowing extrinsic evidence to determine the testator's intent. The appeals court found that the trial court did not err in determining that the testator used an ambiguous term and in allowing the admission of extrinsic evidence to determine the testator's intent.[31] The court also found that the trial court did not err when it considered the frequency of the testator's transactions in the various accounts to determine the character of the accounts as savings accounts.[32]

In *Penland v. Agnich*,[33] the court held that the term "lawful issue" as used in the testator's will was unambiguous and showed the testator's intent to include adopted descendants.[34] The testator executed his will in 1945 and died soon thereafter. The residue of the testator's estate passed into a testamentary trust for the benefit of his wife, with the remainder passing into two equal shares, one of which would pass equally to the testator's brothers, or to the "lawful issue" of any of them then deceased, and the other half passing equally to the siblings of the testator's wife, or to "lawful issue" of any of them then deceased. The testator's wife died in 1993. None of the testator's siblings or his wife's siblings survived. The biological descendants of the siblings asserted that the testator did not intend to included adopted descendants when he used the term "lawful issue." The trustees sought construction of the will and the trial court granted summary judgment construing the term "lawful issue" to include adopted descendants. The biological descendants appealed, asserting that the law in effect at the time the testator made his will provided that adopted persons would not be considered to be children of the adoptive parents in documents executed by third parties. The appeals court examined the will to ascertain the testator's intent and determined that the testator intended to divide his estate among his family without regard to blood relationships.[35] The court also found that the modifier "lawful" before the term "issue" indicated that the testator did not intend to limit the beneficiaries to blood relatives.[36] The court concluded that, because the will was unambiguous and revealed the testator's intent to include adopted descendants in the term "lawful issue," the trial court appropriately construed the will as a matter of law and did not err in its construction of the will.[37]

In *Skinner v. Moore*,[38] the court held that the inclusion of a gift under the section of the will containing specific bequests constituted a specific

31. *See id.* at 281.
32. *See id.* at 282. The court also held that the trial court did not err when it characterized the individual retirement accounts as savings accounts. *See id.* at 282-83.
33. 940 S.W.2d 324 (Tex. App.—Dallas 1997, writ denied).
34. *See id.* at 327.
35. *See id.* at 327.
36. *See id.*
37. *See id.*
38. 940 S.W.2d 755 (Tex. App.—Eastland 1997, no writ).

bequest rather than a gift to the residuary.[39] The testator made a codicil to his will, in which he left some items to specific beneficiaries. He left the common stock of his two solely owned corporations to the appellee. He then provided, in a separate paragraph immediately following the gift of the common stock, that he left all his rights in four sandwich shop franchises, but he did not state to whom he left these rights. In the next section of his will, the testator left his residuary estate equally to his children. The children contended that their father intended for them to receive the rights in the sandwich shops since he failed to designate a beneficiary. The appellee contended that the codicil was unambiguous and showed the testator's intent to leave her his rights in the sandwich shops. The trial court granted summary judgment for the appellee and the children appealed. The appeals court held that the testator intended to make a specific bequest of his rights in the sandwich shops because he included this gift in the section listing specific bequests.[40] The court then determined that if the paragraph making a gift of the rights in the shops were transposed and added to the paragraph with the gift of the stock in the two corporations, the testator would then have unambiguously provided for a gift of the rights to the appellee.[41] The court stated, however, that even if the gift of the rights in the shops created a patent ambiguity, the trial court properly considered the extrinsic evidence of the attorney who drew the codicil to show testator's intent.[42] The court held that the extrinsic evidence showed the testator's intent to give the rights in the stock to the appellee.[43]

In *Allen v. Talley*,[44] the court held that the gift of the testator's estate to her "living brothers and sisters . . . to share and share alike" clearly showed the testator's intent to make a gift to her siblings who survived her.[45] The testator had three brothers and two sisters living at the time she executed her will, but only one brother and one sister who survived her. Each of the testator's deceased siblings was survived by children. The decedent's sister filed a motion for summary judgment asking the court to determine that only the two surviving siblings took the testator's estate. The son of one of the deceased siblings urged the court to determine that the anti-lapse statute[46] applied and that the shares of each deceased sibling passed to his or her children. The trial court granted the sister's motion for summary judgment. On appeal, the testator's nephew urged the court to find that the testator intended to include children of a

39. *See id.* at 757.

40. *See id.*

41. *See id.*

42. *See id.* The attorney stated that he made a drafting error and that the gift of the rights in the shops should have been included in the paragraph with the gift of the stock. *See id.*

43. *See id.* at 758. The court further found that the trial court did not err by failing to award attorney's fees to the appellee. *See id.*

44. 949 S.W.2d 59 (Tex. App.—Eastland 1997, writ denied).

45. *Id.* at 62.

46. *See* TEX. PROB. CODE ANN. § 68 (Vernon Supp. 1998).

deceased sibling who was living at the time the will was executed in the division of her estate. The court of appeals examined the language of the will to ascertain the testator's intent and determined that the testator would not have made a gift to any of her siblings who were deceased at the time of execution of the will.[47] The court further found that the testator showed her intent by using the phrase "share and share alike," which would have no meaning if she intended for the share of a deceased sibling to pass to his or her children.[48]

C. Admission to Probate

In *Marrs v. Marquis*,[49] the court held that the trial court inappropriately admitted a will to probate because it did not establish that it had jurisdiction.[50] The appellant filed the testator's 1993 will for probate. The appellee contested the probate of the will and, in her contest, offered the testator's 1990 will for probate. The appellee failed to provide all of the information required by Probate Code section 81(a)[51] in her motion. At the hearing the appellant brought the defects in the application to the trial court's attention, but the trial court admitted the 1990 will to probate. The appeals court found that the appellee's application for probate failed to meet statutory requirements in several respects so that the appellee did not establish the trial court's jurisdiction over the probate of the 1990 will.[52] The court also found that the record did not provide proof of service of citation concerning the probate of the 1990 will, so the trial court improperly admitted the 1990 will to probate.[53]

In *Lopez v. Hansen*,[54] the court held that sufficient evidence existed that the purported will was not in the decedent's handwriting to support the trial court's denial of probate.[55] Following the decedent's death, a family friend offered her purported holographic will for probate, but also offered evidence that the first page of the will had been altered by someone other than the decedent. The decedent's heirs objected to the probate and the trial court ultimately dismissed the application for probate and entered a determination of heirship. Later, the decedent's neighbor again offered the will for probate and the heirs again objected. The trial court denied probate. The neighbor timely requested findings of fact and conclusions of law, but failed to determine that the court did not provide the findings and conclusions until the appeals transcript was prepared. The appeals court first held that the neighbor did not comply with the

47. *See Allen*, 949 S.W.2d at 62.
48. *Id.*
49. 927 S.W.2d 304 (Tex. App.—El Paso 1996, no writ).
50. *See id.* at 306.
51. Tex. Prob. Code Ann. § 81(a) (Vernon Supp. 1998).
52. *See Marrs*, 927 S.W.2d at 305.
53. *See id.* at 306 (citing Tex. Prob. Code Ann. § 128 (Vernon 1980)).
54. 947 S.W.2d 587 (Tex. App.—Houston [1st Dist.] 1997, n.w.h.).
55. *See id.* at 590.

time requirement of Rule 297,[56] so she did not preserve error for appeal.[57] The court then found that the neighbor did not provide sufficient evidence that the will was wholly in the decedent's handwriting and affirmed the trial court.[58] The dissent believed that the neighbor offered credible and sufficient evidence that the will was wholly in the decedent's handwriting.[59]

II. NONTESTAMENTARY TRANSFERS

In *Woodfin v. Coleman*,[60] the court held that a judgment determining the contingent payees in the event that the plaintiff did not survive until the last payment required under the judgment was a nontestamentary instrument under Probate Code section 450(a)(1)[61] and that the laws of intestate succession did not apply to the contingent payments.[62] The plaintiff was a minor when he was injured in an accident. The plaintiff's parents were divorced at the time of the injury and his mother, as his next friend, brought suit for damages. The plaintiff's father was not a party to the suit. A guardian ad litem represented the plaintiff's interests in the suit. The parties reached a settlement, under the terms of which the plaintiff was to receive payments on specified future dates. In the event that the plaintiff did not survive until he received all settlement payments, the parties agreed that the defendants would make the payments to the plaintiff's mother and siblings. The district court entered a judgment approving the settlement. The plaintiff died before the due date of the last payment and his father sought to have the judgment invalidated and to have the sums due under the payment pass by the laws of intestate succession. The trial court entered summary judgment against the father, who appealed. The appeals court found that the father could not collaterally attack the judgment approving the settlement.[63] The court further found that, even if the father could collaterally attack the settlement judgment, the plaintiff's estate had no interest in the final settlement payment because the plaintiff did not survive. Thus, he did not meet the condition precedent to receiving the final payment.[64] The court added that even if the plaintiff's estate had an interest in the final payment, the contingency

56. TEX. R. CIV. P. 297. This rule provides that a party has twenty days after the judgment to request findings of fact and conclusions of law. If the court does not file the findings and conclusions following the request, the party has thirty days from the original request to file a notice with the clerk that the trial court has not done so. *See* TEX. R. CIV. P. 297.

57. *See Lopez*, 947 S.W.2d at 589.

58. *See id.* at 590.

59. *See id.* at 590-92 (O'Connor, J., dissenting, joined by Hedges, J.). The dissent noted that the trial court's implied finding of fact that the will was not wholly in the decedent's handwriting was against the great weight of the evidence. *See id.* at 592.

60. 931 S.W.2d 383 (Tex. App.—Austin 1996, writ denied).

61. TEX. PROB. CODE ANN. § 450(a)(1) (Vernon Supp. 1998).

62. *See Woodfin*, 931 S.W.2d at 385.

63. *See id.* The court found that the district court had proper jurisdiction over the parties and the suit, as well as jurisdiction to render its order. *See id.*

64. *See id.*

clause in the settlement, which provided that his mother and siblings would receive the final payment if he did not survive, was a nontestamentary transfer.[65]

In *Haas v. Voigt*,[66] the court held that the husband and one child could not create a joint tenancy with rights of survivorship in community funds between the husband and son without evidence of partition or the wife's gift of her community interest to her husband and that the husband and son could not create a joint tenancy with rights of survivorship between them without the husband's revocation of the designation of certain accounts as community property with rights of survivorship.[67] The husband and son opened a new account, which they designated as a joint tenancy with rights of survivorship between themselves, with the husband and wife's community funds. The son presented no evidence that his parents had partitioned the funds and that the husband established the account with his partitioned, separate funds, or that the wife had made a gift of her community interest in the funds to her husband. The husband and wife had three existing accounts at another bank, which they had opened as joint tenancies with rights of survivorship between themselves. Shortly before the husband's death, he and the son executed new signature cards on these three accounts, which provided that the accounts were joint tenancies with rights of survivorship between the spouses and the son. The husband left his estate to his wife in his will. The wife died shortly thereafter and she left her estate equally to their three children. The other two children contended that the funds in the four accounts all passed to their mother under the prior survivorship agreements and thus passed equally to the three children on their mother's death. The son who was listed as a survivor on the accounts contended that he should receive all of the funds in the new account, as the surviving joint tenant, and one-fourth of the funds in the other three accounts as one of the two survivors under the signature cards. The trial court found that the husband and wife established the accounts with the intent that the survivor of them would own all of the funds in the account on the death of the first of them to die and that the son caused the redesignation of the accounts to list him as a joint tenant with survivorship rights without the knowledge and consent of his mother. The trial court concluded that the funds in all of the accounts passed to the mother on the father's death, then equally to the three children under the terms of her will.

On appeal the court held that the father and son, since they were not spouses, could not create a joint tenancy with rights of survivorship with community property in the new account.[68] The court affirmed the trial court's judgment, finding that the funds in the account established just prior to the father's death passed to the mother under the terms of the

65. *See id.*
66. 940 S.W.2d 198 (Tex. App.—San Antonio 1996, writ denied).
67. *See id.* at 203.
68. *See id.* at 202.

father's will, then passed equally to the three children under the terms of the mother's will.[69] The court then found that since the parents did not revoke their survivorship agreement in the three existing accounts, the son could not acquire a survivorship interest in his father's one-half of the funds held in the accounts.[70]

In *Evans v. First National Bank of Bellville*,[71] the court held that the trial court could consider extrinsic evidence concerning which funds were subject to a survivorship agreement when the intent to create a survivorship account or accounts was clear, but some ambiguity existed concerning which accounts fell under the agreement.[72] The decedent opened a joint checking account with her nephew and specified that the account was a joint tenancy with rights of survivorship. The decedent later opened a certificate of deposit with the same bank, which was issued in the decedent's name only. On the same day the decedent took out the certificate of deposit, she and her nephew executed a new signature card for the time deposit, which specified that the time deposit was in the decedent's name only and that the signature card covered future time deposits. The signature card neither listed account numbers nor stated that it covered all certificates of deposit issued to the decedent. The bank subsequently issued several certificates of deposit to the decedent prior to her death. Following the death of the decedent, the court appointed her nephew as her independent executor. The nephew listed three certificates of deposit on the inventory, and later renewed one certificate of deposit in the estate's name. Afterwards, the nephew withdrew all funds in the certificates of deposit, claiming the funds as the surviving joint tenant. The remaining beneficiaries requested an accounting from the executor and learned that he had taken possession of the funds in the certificates of deposit. The remaining beneficiaries sued the executor, seeking recovery of the funds in the certificates of deposit and his removal as executor. The beneficiaries also sued the bank and the nephew's daughter, who worked at the bank, as well as the nephew's wife and son, alleging that they conspired with the nephew to convert the funds. The executor died shortly before the trial, and the court appointed a successor executor in the decedent's estate. The nephew's daughter served as executor of her father's estate, and, as such, she initiated a third party action against the decedent's successor executor for reimbursement of expenses the nephew incurred in defending the removal action.

The trial court granted several motions for summary judgment requested by the defendants and directed a verdict in favor of the nephew's executor on all issues except the issue of whether the nephew failed to identify estate assets properly and whether he acted in good faith as executor. The jury found that the nephew acted in good faith and identified

69. *See id.* at 202-03.
70. *See id.*
71. 946 S.W.2d 367 (Tex. App.—Houston [14th Dist.] 1997, writ denied).
72. *See id.* at 375.

estate assets, awarded no damages to the beneficiaries, and awarded attorneys' fees to the nephew's estate. The beneficiaries appealed. The appellees asserted that the beneficiaries had no standing to appeal because they were not parties to the third party action against the decedent's successor executor. The successor executor did not appeal the decision, but the beneficiaries instead appealed.

The appeals court held that the beneficiaries had standing to appeal.[73] The court then found that the signature card evidenced the decedent's intent to create a joint tenancy with rights of survivorship in a time deposit held in her name, but that the card did not show which time deposits she intended to be joint tenancies with rights of survivorship.[74] In addition, the signature card, while unambiguous on its face, was ambiguous when considered with the three certificates of deposit.[75] The court held that a trial court may not consider extrinsic evidence as to whether the parties intended to create a joint tenancy with rights of survivorship, but may consider extrinsic evidence concerning what funds fall under a survivorship agreement if an ambiguity concerning the identity of the funds exists.[76] Because the beneficiaries presented a fact issue, the trial court's grant of summary judgment in favor of the nephew concerning the funds covered by the survivorship agreement was improper.[77] The court upheld the summary judgments in favor of the bank and the nephew's daughter because the trial court did not specify the specific grounds on which it based the summary judgments and the appellants did not negate all of the grounds raised by the bank and the nephew's daughter in their motions.[78] The court held that the trial court erred in directing a verdict against the beneficiaries on their claims concerning the nephew's breach of his fiduciary duties, since the claims centered on the issues concerning the certificates of deposit as to which the trial court had granted summary judgment.[79]

III. HEIRSHIP

In *Little v. Smith*,[80] the Texas Supreme Court held that an adoptee could not use the discovery rule to assert a right to inheritance from her

73. *See id.* at 373. The court found that the beneficiaries had the right to appeal because they were aggrieved parties injured by the trial court's judgment. *See id.* The court also found that the beneficiaries had standing to bring the initial action against the nephew. *See id.*

74. *See id.* at 374. The court found that the signature card contained no information identifying which time deposits it would cover. *See id.*

75. *See id.* at 375.

76. *See id.*

77. *See id.* at 376-77.

78. *See id.* at 377-78.

79. *See id.* at 379-80. The court noted that the beneficiaries could not bring forth any evidence concerning the nephew's actions with respect to the certificates of deposit, which limited their ability to show that the nephew may have breached his fiduciary duty. *See id.* The court also held that the trial court should consider the beneficiaries' other claims against the nephew. *See id.* at 380.

80. 943 S.W.2d 414 (Tex. 1997).

natural grandmother[81] and that the discovery rule did not apply to derivative claims against the executor and beneficiaries for such things as fraud, gross negligence, and conspiracy.[82] The appellant was adopted shortly after her birth in 1932. She knew of her adoption from the time she was about ten years old, but she did not seek the identity of her natural parents until approximately 1987. She learned the identity of her natural parents in 1989, and then obtained copies of probate records, including a copy of the will of her biological grandmother, who died in 1982. The grandmother's son served as executor of her will and he closed the estate by affidavit in 1983. The appellant brought action against the executor in 1991, almost eight years after the estate closed, claiming a right to one-twelfth of the estate and seeking actual and punitive damages for fraud, gross negligence, and conspiracy against the executor and the other beneficiaries under the will. The trial court entered summary judgment for the defendants on the basis that the statute of limitations had expired. The court of appeals held that the statute of limitations barred the appellant's claim for an interest in her grandmother's estate, but that the discovery rule applied to her claims for fraud, gross negligence, and conspiracy.[83]

The Supreme Court weighed the competing interests of the right of adoptees to inherit from their biological parents, the statutory confidentiality concerning the identity of biological parents, and the state's interest in the finality of probate proceedings.[84] The Court determined that the policies protecting the identity of biological parents and preserving the finality of probate proceedings outweighed an adoptee's rights to inherit from his or her biological parents, so the discovery rule could not apply to prolong the period in which an adoptee could bring an action asserting inheritance rights.[85] The Court further held that the same reasoning bars any derivative claims against the personal representative of the estate of the biological ancestor and the other heirs or beneficiaries of the estate.[86] The Court stated that "The discovery rule should not be applied to claims against an executor, administrator, or heir for failure to seek out or find an adopted child."[87] The Court concluded that an adoptee must bring "claims for inheritance and any derivative claims . . . within the statutory limitations periods."[88]

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81. *See id.* at 420.

82. *Id.* at 420, 423.

83. Smith v. Little, 903 S.W.2d 780, 786-88 (Tex. App.—Dallas 1995), *aff'd in part, rev'd in part*, 943 S.W.2d 414 (Tex. 1997). For a discussion of this opinion, see Lynne McNiel Candler, *Probate and Trusts*, 49 SMU L. REV. 1245, 1257-58 (1996).

84. *See Little*, 943 S.W.2d at 417-20.

85. *See id.* at 420.

86. *See id.*

87. *Id.* at 422.

88. *Id.* at 423. The concurrence noted that the statute of limitations barred the appellant's causes of action, but would have also held that the appellant could not assert the discovery rule because of the constructive notice found in all probate proceedings. *See id.* at 423-25 (Enoch, J., concurring).

In *Estate of York*,[89] the court held that a mother's interest in her son's estate and in an heirship proceeding in his estate survived the mother's death and that the mother's estate included a property interest in her son's estate.[90] The son died testate, leaving all of his assets in trust for the benefit of his mother during her lifetime, then to two friends. The two friends timely disclaimed all of their remainder interest in the trust. Approximately four years after the son's death a young man filed a determination of heirship proceeding, in which he claimed to be the son's illegitimate child. The mother opposed the young man's claims and asserted her own claims as the son's sole heir. The mother died prior to the determination of heirship and her executor continued pursuit of her claims. The trial court determined that the executor was not an interested party and had no standing in the heirship proceeding. The executor was also named the trustee of a charitable trust under the terms of the mother's will and would receive the assets held in the son's testamentary trust as part of the trust estate, so the executor attempted to pursue the mother's claims in its capacity as trustee. The trial court again ruled that the trustee was not an interested party.

The appeals court determined that the disclaimer of the remainder interest created a lapse of the gift to the trust upon the mother's death because the son made no contingent disposition of his estate.[91] The trust corpus, the court reasoned, passed to the son's estate upon his mother's death and then passed by intestate succession.[92] The court found that a determination of heirship must be made as of the time of the decedent's death and that, since the mother survived her son, the mother was an interested person in her son's estate.[93] The court found that the mother could have devised her interest in her son's estate and that her interest in the heirship proceeding did not terminate with her death.[94] The court held that the mother's executor had standing to represent her interests in the heirship proceeding and to contest the claims of the son's purported illegitimate child.[95]

In *Cantu v. Sapenter*,[96] the court held that the statute of limitations barred the heirship claims of two purported children of the decedent.[97] The decedent died in 1982. His widow never instituted administration of his estate. Four years after the husband's death, the widow conveyed the decedent's real property to third parties. One of the decedent's purported children, whom his widow believed to be the decedent's biological son, died in 1986. No one filed an heirship action until 1993, when the decedent's purported daughter initiated a determination that she and the

89. 934 S.W.2d 848 (Tex. App.—Corpus Christi 1996, writ denied).
90. *See id.* at 850-52.
91. *See id.* at 849-50.
92. *See id.* at 850.
93. *See id.* (citing Sellers v. Powers, 426 S.W.2d 533, 537 (Tex. 1968)).
94. *See id.* at 850.
95. *See id.*
96. 937 S.W.2d 550 (Tex. App.—San Antonio 1996, writ denied).
97. *See id.* at 551.

purported son were the decedent's heirs. The trial court determined that the two purported children were the decedent's heirs, causing the widow and the purchasers of the real property to appeal. The appeals court balanced the rights of an illegitimate child with the state's interest in determining title to property and in the "orderly administration of estates."[98] The court found that the four-year residuary statute of limitations applied.[99] The court further found that the purported daughter and the heirs of the purported son were aware of their purported parentage, knew of the death of the decedent, and knew of his property, yet they took no action until more than ten years after his death.[100] The court further found that the purported heirs had constructive notice of the sale of the property constituting part of the decedent's estate when the widow recorded the deed in which she conveyed the property to the third parties.[101] The court found that the purported heirs could not have filed their action prior to September 1, 1987,[102] at which time their statute of limitations accrued.[103] Because the purported heirs did not file their determination of heirship action until 1993, the statute of limitations barred their claims.[104]

IV. ESTATE ADMINISTRATION

A. JURISDICTION

In *Estate of Crawford v. Town of Flower Mound*,[105] the court held that the county in which real property was located had exclusive jurisdiction over suits for delinquent ad valorem taxes.[106] The decedent owned real property in Denton County at the time of his death. A Dallas County probate court appointed the executor of the decedent's will after admitting the will to probate. The executor paid the ad valorem taxes on the Denton County property for several years, then ceased payment. The city brought suit in district court in Denton County seeking recovery of the unpaid taxes, costs, and penalties. The executor did not receive service of citation for several years after the city filed the suit. The executor made a special appearance and requested that the district court dismiss the suit for lack of jurisdiction. The district court entered judgment against the estate and ordered foreclosure on the liens. The executor requested the Dallas County probate court to enter a temporary restraining order and a temporary injunction on the foreclosure pending appeal,

98. *Id.* at 552-53.
99. *See id.* at 553 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 16.051 (Vernon 1986)).
100. *See Cantu*, 937 S.W.2d at 553.
101. *See id.*
102. The Legislature amended TEX. PROB. CODE ANN. § 42(b) (Vernon Supp. 1998) in 1987 to provide purported heirs with a right to have their heirship determined. Act of June 17, 1987, 70th Leg., R.S., ch. 464, § 1(b), 1987 Tex. Gen. Laws 2051.
103. *See Cantu*, 937 S.W.2d at 553.
104. *See id.*
105. 933 S.W.2d 727 (Tex. App.—Fort Worth, 1996, writ denied).
106. *See id.* at 730-31.

which the Dallas County probate court granted. The appeals court noted that the Tax Code[107] and the Probate Code[108] were in conflict concerning proper jurisdiction.[109] The court determined that the Tax Code provisions must prevail over the Probate Code provisions.[110] The court also held that the executor and the estate failed to preserve error on the issue of proper parties because the executor did not specifically plead that the city could not sue the estate, but could only sue the personal representative of the estate.[111]

In *Estate of C.M. v. S.G.*,[112] the court held that the trial court did not have jurisdiction to enter judgment against a decedent's estate.[113] The appellees sued the estate and the decedent's husband for negligence and gross negligence. The decedent's husband served as executor of her estate, but the appellees did not name him in his fiduciary capacity as a defendant. The trial court entered judgment against both the husband, individually, and the estate. The appeals court stated that claims against an estate must be brought against the personal representative in order for the trial court to "have jurisdiction to enter a judgment."[114] The court added, however, that a judgment against an estate may not be void if the personal representative appears or participates in the suit in the capacity as personal representative.[115] The decedent's husband participated in the suit as an individual defendant, but the record did not reveal that he participated as executor, nor that he entered an appearance as executor.

B. CREDITORS

In *Woodward v. Jaster*,[116] the court held that the sale of a decedent's real property in order to pay debts of estate administration extinguished a lien placed upon the real property by the beneficiary's creditor.[117] The decedent's holographic will did not name an executor, so her son qualified as independent administrator. The decedent divided her estate between her son and a trust for the benefit of her daughter. Several months

107. TEX. TAX CODE ANN. § 33.41(a) (Vernon 1992 & Supp. 1998) (providing that the county in which the real property lies has jurisdiction over suits for foreclosure of tax liens).

108. TEX. PROB. CODE ANN. §§ 5(c), 5(e), 5A (Vernon Supp. 1998).

109. *See Estate of Crawford*, 933 S.W.2d at 729.

110. *See id.* at 729-30. The court noted that the personal representatives of estates know the location of real property, whereas the taxing authorities have no method of determining the county in which the probate of a deceased property owner is pending, thus the burden for the taxing authorities is greater than the burden for the personal representative. *See id.* at 730.

111. *See id.* at 731. The city apparently named only the estate as a party to the foreclosure suit. The executor filed a general denial, in which he did not raise the issue that the estate was not a legal entity. The court held that the executor must have specifically stated the defect in parties in his verified answer to preserve the error. *See id.*

112. 937 S.W.2d 8 (Tex. App.—Houston [14th Dist.] 1996, no writ).

113. *See id.* at 10-11.

114. *Id.* at 10.

115. *See id.*

116. 933 S.W.2d 777 (Tex. App.—Austin 1996, no writ).

117. *See id.* at 781.

following the decedent's death, the son had paid her debts and distributed most of the cash in the estate. The decedent's daughter suspected her brother's actions, however, and hired an attorney to remove her brother as independent administrator. This action resulted in additional costs for the estate, as well as legal fees for the daughter. The daughter failed to pay her legal fees, and her attorney obtained a judgment against her and filed the abstract of judgment against certain real property allocated to the daughter's trust, although not yet distributed to the trustee. The additional expenses the son incurred in connection with the removal action necessitated the sale of the real property, which he conveyed to third parties. The Woodwards' attorney brought an action against the administrator, the purchasers, and the trustee, requesting the court to find that the lien still existed and seeking foreclosure of the lien. The trial court denied relief to the attorney and entered sanctions against him for bringing the action in bad faith. On appeal, the court first determined that the attorney had a valid lien against the property at the time he filed the abstract of judgment.[118] The court then determined that the administrator had a right and obligation to sell the decedent's property to pay debts and estate administration expenses, and that the administrator's right and obligation is superior to a beneficiary's vested interest in the estate property.[119]

In *Texas Commerce Bank v. Geary*,[120] the court held that Probate Code section 306[121] applies to independent administrations[122] and that the creditor elected preferred debt and lien status by not taking other action within six months of the date the probate court granted letters testamentary.[123] The decedent, individually and in his capacity of president of a corporation, executed a loan modification agreement on a note secured by a lien on real property. The decedent later died and the probate court granted letters testamentary in October 1991. The corporation filed for bankruptcy eleven months later and the holder of the note foreclosed on the property the next year, after the bankruptcy court confirmed the corporation's reorganization plan. The foreclosure sale resulted in a deficiency. In October 1993, the probate court converted the administration from independent to dependent and appointed the former executor as dependent administrator. The holder of the note then asserted a claim against the decedent's estate for the deficiency on the note. The trial

118. *See id.* at 781. The court found that the attorney properly abstracted the judgment against the trustee of the daughter's trust, which had a vested interest in the property under the decedent's will. *See id.* The court thus found that the attorney had a valid lien against the property at the time he abstracted the judgment. *See id.*

119. *See id.* The court stated that "[i]f the beneficiary's interest can be divested by a sale to pay debts of the estate, it follows that the sale by the administrator extinguishes any lien against the beneficiary's interest in the property." *Id.* at 782.

120. 938 S.W.2d 205 (Tex. App.—Dallas 1997), *rev'd*, (Tex. Apr. 14, 1998) (opinion not available as of date of publication).

121. TEX. PROB. CODE ANN. § 306 (Vernon Supp. 1998).

122. *See Texas Commerce Bank*, 938 S.W.2d at 208-09.

123. *Id.* at 212.

court granted summary judgment for the administrator's denial of the claim. The appeals court analyzed the interaction of Probate Code section 146[124] with Probate Code section 306[125] and held that section 306 applies to independent administrations.[126] The court then held that the holder of the note, by not making a claim or an election within six months of the date the court appointed the independent executor and authorized letters testamentary, effectively elected to have the debt treated as a preferred debt and lien.[127] The dissent would have held that Probate Code section 306[128] does not apply to independent administrations.[129]

C. Independent Administrations

In *D'Unger v. De Pena*,[130] the Texas Supreme Court held that the probate court abused its discretion when it refused to release funds held in its registry to the independent executor, who replaced a dependent administrator.[131] The probate court appointed a dependent administrator of the decedent's estate because of a will contest. All interested parties later agreed to the probate of the will, and the court admitted the will to probate and appointed the independent executor named in the will. The executor applied for the release of funds held in the registry of the court. The probate court denied the executor's request because it had not approved the dependent administrator's final account and could not discharge the dependent administrator pursuant to Probate Code section 221(d).[132] The executor sought a writ of mandamus, which the court of appeals originally granted, then denied. The Supreme Court found that the probate court could not withhold estate property from the independent executor.[133] In addition, the Court found that the dependent admin-

124. Tex. Prob. Code Ann. § 146 (Vernon 1980) (providing that an independent executor must satisfy claims against the estate as provided in other sections of the Probate Code).

125. Tex. Prob. Code Ann. § 306(a) (Vernon 1980). This rule provides that a secured creditor has two options for the classification and priority of its claim: treatment of the claim as a matured secured claim, or treatment as a preferred debt and lien. If the creditor makes no election as to treatment or files no claim within six months from the date the court grants letters testamentary, the claim automatically becomes a preferred debt and lien. *See id.* §§ 298(a), 306(b). The six month rule was amended after the date of the trial by Act of May 27, 1995, 74th Leg., R.S., ch. 1054, § 9, 1995 Tex. Gen. Laws 5207, 5210.

126. *See Geary*, 938 S.W.2d at 208. The court, after analyzing the decision in Bunting v. Pearson, 430 S.W.2d 470 (Tex. 1968), held that Tex. Prob. Code Ann. § 146 (Vernon 1980) specifically mandates that section 306 applies to independent administrations. *See* 938 S.W.2d at 210.

127. *See Geary*, 938 S.W.2d at 212. If a creditor elects preferred debt and lien status, the creditor has the advantage of having priority over all other claims to the extent of its collateral, but cannot collect any deficiency from other estate assets, Tex. Prob. Code Ann. § 306(a)(2), (c) (Vernon Supp. 1998). The court held that the trial court properly denied the holder's motion for summary judgment. *See* 938 S.W.2d at 212.

128. Tex. Prob. Code Ann. § 306 (Vernon Supp. 1998).

129. *See Geary*, 938 S.W.2d at 215-19 (Maloney, J., dissenting).

130. 931 S.W.2d 533 (Tex. 1996).

131. *See id.* at 534-35.

132. Tex. Prob. Code Ann. § 221(d) (Vernon Supp. 1998).

133. *See D'Unger*, 931 S.W.2d at 534.

istration ceased when the probate court appointed the independent executor and authorized letters testamentary, even though the probate court had not yet discharged the dependent administrator.[134] The Court also found that the probate court had no statutory authority to retain the funds in the court's registry and thus abused its discretion by failing to release the funds to the independent executor.[135]

In *Olguin v. Jungman*,[136] the court determined that Probate Code section 78[137] applies to the appointment of independent executors,[138] but that a potential conflict of interest between the fiduciary roles of independent executor of one estate and testamentary trustee under the will of another decedent does not necessarily result in the unsuitability of the person to serve as independent executor.[139] Dr. Brunner, in his will, created a charitable remainder trust for the benefit of Ms. Flores during her lifetime. Ms. Flores left most of her estate to her daughter. The same attorney drafted both the Brunner and Flores wills, and both testators named the same executor, who also served as trustee of the testamentary trust created under the Brunner will. The executor of the Flores will discovered that her estate did not have the liquidity to pay her debts and, in his capacity as executor of the Flores will, sought the return of an automobile that Flores left her daughter. The daughter believed that her mother's estate should have sufficient liquidity to pay debts and questioned distributions that the executor, in his role as trustee of the charitable remainder trust, paid to her mother during the trust term. The daughter then questioned the grant of letters testamentary to the named executor. The daughter contended that the trial court should have found that the named executor was unsuitable to serve as independent executor under Probate Code section 78(e).[140] The appeals court first found that Probate Code section 78[141] applies to the appointment of independent executors.[142] The court then found that the daughter did not prove that the trial court abused its discretion in appointing the independent executor merely by showing that the independent executor might have a conflict of interest between his roles as testamentary trustee of the Brunner trust and independent executor of the Flores will.[143]

The court in *Estate of Riggins*,[144] upheld sanctions against co-executors

134. *See id.*
135. *See id.*
136. 931 S.W.2d 607 (Tex. App.—San Antonio 1996, no writ).
137. TEX. PROB. CODE ANN. § 78 (Vernon Supp. 1998).
138. *See Olguin*, 931 S.W.2d at 609.
139. *See id.* at 610.
140. TEX. PROB. CODE ANN. § 78(e) (Vernon Supp. 1998) (providing that a court may disqualify a person from serving as executor if the court finds that person unsuitable).
141. TEX. PROB. CODE ANN. § 78 (Vernon Supp. 1998).
142. *See Olguin*, 931 S.W.2d at 609.
143. *See id.* at 610. The court also found that the trial court did not abuse its discretion by failing to require the independent executor to post a bond or, by failing to disqualify the attorney from representing the executor because he also represented the executor in connection with both the Brunner trust. *See id.* at 611.
144. 937 S.W.2d 11 (Tex. App.—Amarillo 1996, writ denied).

for discovery abuses.[145] The co-executors, who were brothers and the sole beneficiaries under their mother's will, filed suit against their sister for forging checks on their mother's account. The sister then filed a will contest, alleging undue influence and lack of testamentary capacity. The brothers failed to respond to discovery requests in a timely manner and, when they did respond, the responses were incomplete. The co-executors alleged that their untimely, incomplete responses were due to the illness of their attorney. The trial court heard three motions for sanctions, first granting no sanctions, then striking all witnesses but the co-executors when they still did not comply with discovery requests, then striking one of the co-executors as a witness when the co-executors still failed to comply with discovery requests. The trial court subsequently withdrew the will from probate. The former co-executors appealed, alleging that the trial court abused its discretion in granting sanctions against them, which resulted in their inability to present evidence favorable to their cause upon trial of the issues. The appeals court held that the trial court did not abuse its discretion and that the severity of the sanctions related directly to discovery abuses.[146]

In *Sammons v. Elder*,[147] the court held that independent executors who are also named beneficiaries under the will do not lack legal capacity to perform their fiduciary duties as executors.[148] The testator named her two children as independent co-executors of her will. The testator left her two children all of her savings accounts and savings certificates, and left her residuary estate equally to her two children and her step-daughter. The step-daughter questioned the co-executors' characterization of accounts as savings accounts and savings certificates and filed a will construction suit, in which she also sought removal of the co-executors on grounds including gross misconduct and mismanagement of the estate and lack of legal capacity to serve. The trial court did not remove the co-executors. The appeals court first found that the step-daughter did not prove that the co-executors breached their fiduciary duties and committed gross misconduct or mismanagement of the estate.[149] The court then held that the co-executors did not lack legal capacity to serve merely because they were also beneficiaries under the will.[150]

In *Vinson & Elkins v. Moran*,[151] the court held that status as a successor administrator or as a co-executor of an estate does not give the successor administrator or co-executor the right to assign a legal malpractice

145. *See id.* at 21.

146. *See id.*

147. 940 S.W.2d 276 (Tex. App.—Waco 1997, writ denied). For a discussion of other issues in this case, see *supra* notes 29-32 and accompanying text.

148. *See id.* at 284.

149. *See id.* at 283. The court found that the step-daughter made many allegations concerning the conduct of the co-executors, but that some of the allegations were without merit and the step-daughter failed to prove the other allegations. *See id.*

150. *See id.* at 284.

151. 946 S.W.2d 381 (Tex. App.—Houston [14th Dist.] 1997, writ dism'd by agr.).

claim against the attorneys who represented the co-executors.[152] The testator named three co-executors, two of which were family members and one of which was a bank. The attorneys who drafted the will served as initial attorneys for the estate, but withdrew after the bank hired another law firm to handle a will construction suit and questions arose concerning drafting errors. The law firm engaged by the bank became the attorneys for the co-executors. The law firm had a close relationship with the bank that resulted in numerous conflicts of interest, many of which resulted in detriment to the estate and its beneficiaries. The law firm failed to disclose the conflicts of interest to the two individual co-executors and the estate beneficiaries. Eventually the three co-executors were involved in a lawsuit between themselves involving the sale of one of the estate's business. The law firm continued to work for the estate, but stated that it could not represent any of the co-executors. The law firm, however, suggested counsel for the bank and worked with the bank's counsel in connection with the suit. The co-executors finally settled the lawsuit and a second bank replaced the original co-executors. All of the beneficiaries released the original co-executors, as well as all attorneys who represented the co-executors in connection with the lawsuit. No one released the law firm who represented the estate, however, and some of the beneficiaries wished to pursue legal malpractice claims against the law firm. Other beneficiaries did not wish to pursue malpractice claims against the law firm and they assigned their claims to other family members. One of the original co-executors assigned his claim. The jury found that the law firm was negligent, breached its fiduciary duty, and conspired against the estate. The trial court entered a large judgment against the law firm in favor of the two family members individually and as assignees. The appeals court held that no one may assign legal malpractice claims for public policy reasons.[153] The court then held that the successor administrator could not assign the estate's claim, although it could have itself brought the claim on behalf of the estate.[154] The court likewise held that a co-executor could not assign a claim, although he himself could have brought the claim against the law firm.[155]

V. GUARDIANSHIPS

A. JURISDICTION

In *DB Entertainment, Inc. v. Windle*,[156] the court held that Probate Code section 608[157] does not give a statutory probate court authority to

152. *See id.* at 398.
153. *See id.* at 394-95.
154. *See id.* at 398.
155. *See id.* The court stated that "[w]hen the assignment is invalid as a matter of law, the status of the assignor is irrelevant." *Id.*
156. 927 S.W.2d 283 (Tex. App.—Fort Worth 1996, orig. proceeding [leave denied]).
157. TEX. PROB. CODE ANN. § 608 (Vernon Supp. 1996) (providing that a statutory probate court may transfer to itself a "cause of action appertaining to or incident to a guardianship estate" that is pending in another court).

transfer a wrongful death cause of action from district court to the statutory probate court.[158] The mother of the two minor wards filed a wrongful death cause of action on her own behalf and as next friend for the two children. The mother initially filed the wrongful death cause of action in district court in Denton County, but she later agreed to a transfer of venue to Tarrant County. Several months after the transfer of the case to Tarrant County, the mother filed for guardianship of her two minor children. After the statutory probate court in Denton County appointed the mother as guardian for her two children, she filed motions with the probate court to transfer the wrongful death suit to the probate court. The statutory probate court granted the guardian's motions and transferred the wrongful death suit to itself. The defendants in the wrongful death suit sought a writ of mandamus, alleging that the probate court had no authority to transfer the suit, entered a void order, and abused its discretion in granting the transfer. The court found that, pursuant to Probate Code section 607(c),[159] a statutory probate court has concurrent jurisdiction with a district court in all actions brought by or against a guardian in his or her capacity as guardian, regardless of whether the cause of action appertains to or is incident to the guardianship estate.[160] The court determined, however, that Probate Code section 608[161] provides that a statutory probate court may only transfer to itself causes of action appertaining to or incident to a guardianship estate, not all actions brought by or against the guardian acting in his or her capacity as guardian.[162] The court found that the statutory probate court had no authority to transfer the wrongful death action to itself.[163]

In *Milton v. Herman*,[164] the court held that a statutory probate court had no authority to transfer to itself a divorce proceeding and the parent-child proceeding that accompanied the divorce from district court.[165] The ward and his wife married in 1991 and had one child. The ward became incompetent in 1995, and his wife later sought a guardianship for him. After her appointment as guardian, the wife filed for divorce in district court and requested custody of their child. The wife resigned as guardian the next day. The probate court appointed the attorney ad litem for the ward as his guardian and authorized the new guardian to hire an attorney to represent the ward's interests in the divorce. The probate court ordered the transfer of the divorce and parent-child action from district court to the probate court. The wife requested the district court to enjoin the transfer of the proceedings to the probate court, and the district court

158. *See Windle*, 927 S.W.2d at 289.
159. TEX. PROB. CODE ANN. § 607(c) (Vernon Supp. 1996).
160. *See Windle*, 927 S.W.2d at 287.
161. TEX. PROB. CODE ANN. § 608 (Vernon Supp. 1996).
162. *See Windle*, 927 S.W.2d at 287.
163. *See id.* at 288. The court added that, even if the statutory probate court had the authority to transfer the wrongful death action to itself, it abused its discretion in doing so because venue was proper in Tarrant County. *See id.*
164. 947 S.W.2d 737 (Tex. App.—Austin 1997, orig. proceeding).
165. *See id.* at 742.

obtained the agreement of the parties not to transfer the proceedings until the appeals court determined whether the probate court had authority to transfer the proceedings. The appeals court found that the divorce and parent-child proceedings involved issues other than those concerning the guardianship estate and, consequently, the divorce action and related parent-child proceeding were not "appertaining to or incident to" the guardianship estate.[166] The court held that Probate Code section 608[167] did not grant the probate court authority to transfer to itself a matter not appertaining to or incident to the estate.[168]

B. GUARDIAN AND WARD

In *Coleson v. Bethan*,[169] the court held that a trial court may remove an attorney ad litem the trial court had appointed if the trial court follows proper procedures and makes a record that shows the justification for the removal and appointment of another attorney ad litem.[170] The parents of a minor ward applied to be named the guardians of his estate and the trial court appointed an attorney ad litem to represent the minor in connection with the application for appointment of guardian. The court appointed both parents as the guardians of the ward, but the mother later resigned. The trial court never dismissed the ad litem following the appointment of the guardians. The ad litem pointed out the parents' failure to post bond and file annual accounts in a timely manner on several occasions, which led to conflict between the ad litem and the parents. The parents filed a motion to have the ad litem removed in 1994 based upon the conflict between them, but the court denied the motion and found that retaining the ad litem was in the best interest of the guardianship estate. After further acrimony between the guardian's attorney and the ad litem, the court removed the ad litem without a hearing. The court's order recited that the court acted on its own motion after considering the acrimony between the guardian and the ad litem and reviewing the file. The court removed the ad litem and appointed another ad litem because the court found that a continual need for an ad litem existed. The ad litem appealed his removal, alleging that the court should not have removed him based on communications with the guardian's attorney and without notice and a hearing.

The appeals court found that the trial court should have discharged the ad litem when the guardians qualified, but because the ad litem received no discharge, he had the continuing responsibility to represent the ward's interest when the guardian failed to file annual accounts in a timely manner.[171] The court also held that the trial court should have given notice to

166. *Id.* at 741.
167. TEX. PROB. CODE ANN. § 608 (Vernon Supp. 1996).
168. *See Milton*, 947 S.W.2d at 741-42. The court also held that the probate court's exercise of pendent jurisdiction would not promote judicial economy. *See id.* at 742.
169. 931 S.W.2d 706 (Tex. App.—Fort Worth 1996, no writ).
170. *See id.* at 713-14.
171. *See id.* at 711.

the ad litem of the hearing on his removal.[172] The appeals court stated that the only manner of creating a record that supported removal of the ad litem was by holding a hearing.[173]

In *Hardeman v. Judge*,[174] the court held that a guardian may abandon the ward's homestead rights if doing so serves the ward's best interests.[175] The ward, an elderly woman, lived on her family farm until she was unable to continue to live on her own. The guardian, the ward's daughter, applied to the court to allow the guardian to sell the family farm, which was homestead property. Although the guardian rented the house on the property and rented out the farm for pasture, the income generated, together with the ward's other income, was insufficient to pay the ward's living and medical bills. The guardian had a buyer willing to pay a significant sum for the property, which would provide adequate funds to pay the ward's expenses. The ward's son and his daughter, who were the named beneficiaries of the ward's last will, contested the motion to sell the property, but the trial court entered an order approving the sale. The son and granddaughter appealed. The appeals court found that the guardian had the power to sell the property to provide for the ward's living and medical expenses, even if the sale eliminated the ward's ability to make a gift of the property to the beneficiaries named in her will.[176]

VI. *INTER VIVOS* GIFTS

In *Dorman v. Arnold*,[177] the court held that the alleged donor evidenced no intent to make an *inter vivos* gift.[178] The decedent, whose three daughters survived him, had some inability to manage his affairs. His sister served as the decedent's Social Security representative and handled his financial affairs for several years prior to the decedent's death. Several months prior to his death, the decedent's sister withdrew the decedent's funds in his savings account and placed them in a new account in her name. The sister used the funds withdrawn from the decedent's account to pay for his living and funeral expenses. The daughters attempted to collect the funds in the savings account and learned that the sister held the remaining funds. The daughters filed an application for determination of heirship. The sister filed suit for declaratory judgment that the decedent gave the funds to her. In a cross-action, the daughters alleged that the sister converted the decedent's funds and requested an accounting. The trial court determined that the funds belonged to the sister. The appeals court found that evidence the sister presented con-

172. *See id.* at 712. The court found that notice was proper whether the trial court brought the removal on its own motion or the guardian's counsel requested the removal. *See id.*
173. *See id.*
174. 931 S.W.2d 716 (Tex. App.—Fort Worth 1996, writ denied).
175. *See id.* at 719.
176. *See id.*
177. 932 S.W.2d 225 (Tex. App.—Texarkana 1996, no writ).
178. *See id.* at 228.

cerning the purported gift was insufficient to prove that the decedent had the intent to make a present gift, and the evidence instead showed that the decedent desired for the funds in the savings account to remain his during his lifetime.[179] The court also found no evidence that the decedent intended to make a gift *causa mortis* of the funds to his sister.[180] The court held that, because the decedent's statements concerning the funds evidenced a testamentary intent, the funds belonged to his estate at his death and passed under the laws of descent and distribution to his heirs.[181]

In *Eversole v. Williams*,[182] the court held that a remainder interest vested in the life beneficiary's children on the date of the deed creating the life estate.[183] The grantors executed a deed in 1933, in which they conveyed a life estate in certain real property to their daughter. The deed specified that the life tenant's children would hold the remainder interests. The life tenant had three children at the time her parents granted her the life estate. One of the life tenant's children died in 1958, leaving his estate equally to his mother, father, sister, and brother. The life tenant's husband died in 1972, leaving his entire estate to the life tenant. The life tenant's daughter died in 1991, leaving her estate, by intestacy, to her only child. The life tenant died in 1994, and her surviving son died soon thereafter, leaving his estate to his four children. Prior to his death the surviving son filed a declaratory judgment action, seeking a construction of the deed. He contended that the remainder interest did not vest until the life tenant's death and that he should receive fee simple title to all the property as her sole surviving child. The daughter of the second child to die filed a motion for summary judgment, requesting the court to find either that the deed constituted a restraint on alienation, so that it conveyed a fee simple interest to the life tenant, or that the remainder interests vested at the time of the deed. Under either theory, the daughter of the deceased child would receive one-half of the real property. The trial court granted summary judgment in favor of the daughter of the deceased child and declared that she owned one-half of the real property and the children of the surviving son equally owned the other one-half. The appeals court found that the deed does not require a child to survive the life tenant in order to have an interest in the real property, but merely postpones the child's right to possess and enjoy the property until after

179. *See id.* The sister herself testified that the decedent told her that he wanted her to have the remaining funds when he died. The appeals court found that this testimony was the evidence most favorable to the sister's contention, but that it did not demonstrate the decedent's intent to make a gift to his sister during his lifetime. *See id.*

180. *See id.* 228-29. The court noted that a gift *causa mortis* requires a present donative intent, which the decedent did not demonstrate. *See id.* at 229.

181. *See id.* at 229. The court also reversed the award of attorney's fees to the sister because the trial court awarded the fees on the basis that the sister was the prevailing party, which was clearly erroneous. *See id.* The concurring opinion added that no gift occurred because no evidence of delivery of the gift existed. *See id.* at 229-30 (Grant, J., concurring).

182. 943 S.W.2d 141 (Tex. App.—Houston [1st Dist.] 1997, no writ).

183. *See id.* at 144.

the life tenant's death.[184]

VII. TRUSTS

A. TRUSTS AND TRUSTEES

In *Lemke v. Lemke*,[185] the court held that the wife of a trust's beneficiary had no standing to challenge the trust's validity.[186] Several years prior to marriage the husband received a large medical malpractice settlement, which he placed in trust. The husband was the sole beneficiary of the trust, and a third party served as trustee. The trustee had discretion to distribute income and principal to or for the benefit of the husband for health, support, maintenance and education needs. The husband and wife married, then separated only a few months later. During the divorce proceedings the wife contended that the husband could not have created the trust because he did not have capacity to do so and that she had a community property interest in some or all of the assets of the trust. The trial court found that all of the assets of the trust, including its income, were the separate property of the husband. The appeals court held that any undistributed trust income was the husband's separate property.[187] The court then held that the wife was not an interested person as defined in Property Code section 111.004(7),[188] thus she did not have standing to contest the validity of the trust.[189] The court also held that the trust was not an indispensable party to the divorce action.[190]

In *Wils v. Robinson*,[191] the court held that a grantor could not terminate an irrevocable trust pursuant to Property Code section 112.054(a)(2)[192] because the grantor retained a testamentary power of appointment and because the spendthrift provisions of the trust did not apply.[193] The grantor executed the trust agreement in connection with the settlement of a family dispute. At the time the grantor executed the agreement, he was a mentally competent adult. The grantor received income from the trust for several years. The grantor also sued the initial trustee, who was the grantor's attorney during the family dispute, which resulted in a settlement and court appointment of a successor trustee. Eight years after the grantor created the trust and two years after he sued the trustee, the grantor sought to terminate the trust. The trial court terminated and rescinded the trust. The attorney *ad litem* appointed to represent the unborn and unascertained beneficiaries of the trust, appealed,

184. *See id.*
185. 929 S.W.2d 662 (Tex. App.—Fort Worth 1996, writ denied).
186. *See id.* at 664.
187. *See id.*
188. TEX. PROP. CODE ANN. § 111.004(7) (Vernon Supp. 1996).
189. *See Lemke*, 929 S.W.2d at 664.
190. *See id.* at 665.
191. 934 S.W.2d 774 (Tex. App.—Houston [14th Dist.], writ dism'd by agr.).
192. TEX. PROP. CODE ANN. § 112.054(a)(2) (Vernon 1995) (allowing for the termination of a trust if its purposes cannot be met due to unforeseen circumstances).
193. *See Wils*, 934 S.W.2d at 779.

contending that the court should not have terminated the trust and that the court erred in rescinding the trust upon grounds the grantor did not plead or prove.

The appeals court examined the trust agreement and determined that the trust was irrevocable.[194] The appeals court then found that even though the grantor may not have known that he was creating the trust, he could still receive the income during his lifetime and the principal could still be distributed to the remainder beneficiaries following the grantor's death, so following the terms of the trust would not defeat its purposes.[195] The ad litem also alleged that the trial court erred by rescinding the trust based upon undue influence. The grantor pled undue influence in the creation of the trust, but the appeals court found that the grantor did not prove that his attorney unduly influenced him to create the trust.[196] The appeals court also found that the grantor should not be granted an equitable rescission of the trust since he accepted benefits under the trust.[197]

In *Cleaver v. Cleaver*,[198] the court held that the wife's beneficial interest in a trust was her separate property,[199] but that interest earned on undistributed income was community property.[200] The wife's father died when she was thirteen and established a testamentary trust for her benefit. The trust required distributions of income to the wife after she reached age twenty-one. The wife's children were the remainder beneficiaries of the trust. The wife had no interest in trust corpus. The trust owned a small percentage in the stock of two corporations. The corporations made few distributions to its shareholders, but instead retained earnings for expansion. The husband, while admitting that the wife's interest in the trust was her separate property, complained that she did not prove the separate property characteristics of her beneficial interest by clear and convincing evidence. The appeals court disagreed.[201] The husband next alleged that the earnings on undistributed income retained in the corporations and in a partnership in which the trust also held an interest were commingled and constituted community property. The appeals court again disagreed, finding that no commingling of community and separate funds occurred in the partnership because partnership funds belong to the partnership entity, not to the partners, and thus do not have community or separate characteristics.[202] The court likewise found that the corporate retained earnings were the property of the corporation, not

194. *See id.* at 777.

195. *See id.* at 779.

196. *See id.* at 780-81.

197. *See id.* at 783. The court also found that the grantor did not challenge the existence of the trust when he sought removal of the trustee, which also mitigated against equitable rescission. *See id.*

198. 935 S.W.2d 491 (Tex. App.—Tyler 1996, no writ).

199. *See id.* at 494.

200. *See id.*

201. *See id.*

202. *See id.*

the shareholders.[203] The trustee failed to distribute some income to the wife and the court held that, to the extent any interest had accrued on the undistributed income, the interest was community property subject to division.[204]

In *Hoenig v. Texas Commerce Bank*,[205] the court held that a predecessor trustee breached its fiduciary duty[206] and thus was liable for resulting damages.[207] The testator, as lessor, leased real property fronting on two streets for a primary term of five years with two five-year renewal terms. The lessee subleased the original retail spaces that fronted on one of the streets and added improvements to the property fronting the other street, subleasing those spaces as well. The testator died two years after she entered the lease agreement with the lessee. The testator appointed a local bank as trustee of her testamentary trust, and the bank assumed the lessor's rights and responsibilities under the lease. The bank apparently never was aware that the property to which the lessee had made improvements was part of the trust estate. At approximately the same time as the second renewal term of the lease expired, the appellee solicited trust business from the original trustee, including the trust holding the real property. The original trustee did not negotiate a new lease with the lessee and notified him that the lease had expired by its terms. The original trustee notified the tenants of the storefronts facing one street to make all future rent payments to it. The original trustee did not contact the tenants of the spaces facing the other street since it was unaware that the property was part of the trust estate. The subtenants continued making rent payments to the lessee, whose lease had expired. Late that year, the court named appellant as successor trustee. The appellant assumed administration of the trust approximately four months later. Shortly after assuming its duties appellant discovered that the spaces facing the second street were part of the trust property. The appellant took action to stop the lessee from collecting rent payments. The lessee had collected the rent for almost a year and a half after his lease had expired.

The appellant sued the lessee and the original trustee for recovery of the loss of rentals. The trial court found that the original trustee's negligence in failing to discover the property and in preventing the lessee's conversion of the rent payments made it liable. The original trustee appealed, asserting that its acts and omissions did not rise to the level of "culpable" negligence, so it could not be liable for any breach of duty. The testator's will stated that the trustee would not be liable for any loss to the trust estate unless it acted either with "culpable negligence," or intentionally. The trial court interpreted the term "culpable negligence" as ordinary negligence rather than gross negligence. The appeals court

203. *See id.*
204. *See id.*
205. 939 S.W.2d 656 (Tex. App.—San Antonio 1996, no writ).
206. *See id.* at 661.
207. *See id.* at 662.

agreed.[208] The original trustee also complained that it should not be held liable, even under an ordinary negligence standard, for its failure to discover all of the trust property since the lessee's actions were intentional.

The appeals court held that the lessee's intentional misconduct was a foreseeable result of the original trustee's negligence in failing to account for all trust assets, so the trustee could not escape liability because of the lessee's intentional actions.[209] The court also found that the trial court properly found a breach of trust when the original trustee failed to discover the extent of trust property and collect income from the property.[210] The appeals court held that the original trustee was jointly and severally liable with the lessee for the lost revenues.[211] The original trustee attempted to persuade the appeals court that the successor trustee was also negligent for failure to discover the property. The court found first that the successor trustee, under the terms of the judgment appointing the successor trustee, specifically had no liability for acts or omissions that occurred during the tenure of the original trustee.[212] The court then found that the successor trustee quickly discovered that the property was part of the trust estate, while the original trustee never discovered the extent of the trust property, which provided sufficient evidence to support the trial court's ruling that the successor trustee was not negligent.[213]

In *Burns v. Miller, Hiersche, Martens & Hayward, P.C.*,[214] the court held that the assets held in a spendthrift trust were exempt from a turnover order.[215] The appellant was the beneficiary of spendthrift trusts created under his parents' wills. The trustee of each trust had discretion to make distributions for the beneficiary's support and maintenance. The beneficiary had a judgment entered against him. The successor in interest to the judgment creditor requested the court to require the beneficiary to turn over property to satisfy the judgment. The trial court ordered the beneficiary to turn over disbursements from the trusts to the judgment creditor and to direct the trustees to make all future distributions to a receiver. On appeal the court held that the assets held in the spendthrift trusts were exempt from a court-ordered turnover.[216] The court also held that the trial court did not order turnover of trust assets by ordering the beneficiary to notify the trustees to make all future distributions to the receiver.[217] The court further held, however, that distributions from the

208. *See id.* at 660.
209. *See id.* at 661.
210. *See id.*
211. *See id.* at 662. The court also held that the trial court did not err in its award of attorney's fees against the original trustee. *See id.*
212. *See id.*
213. *See id.* at 663.
214. 948 S.W.2d 317 (Tex. App.—Dallas 1997, writ denied).
215. *See id.* at 322.
216. *See id.*
217. *See id.*

spendthrift trusts were exempt from turnover orders.[218]

B. Charitable Trusts

In *Baywood Country Club v. Estep*,[219] the court held that the *cy pres* doctrine did not apply to prevent the dissolution of a country club corporation and distribution of corporate assets to the members.[220] Humble Oil and Refining Company deeded acreage to Humble Recreation Club, a nonprofit, non-stock corporation formed to provide recreational facilities to employees of Humble Oil. The club changed its name on two subsequent occasions and also amended its articles of incorporation to provide for the issuance of stock. A majority of the stockholders determined to dissolve the corporation in 1993, but the officers of the corporation resisted the dissolution and refused to call a special meeting for purposes of discussing the dissolution. The members sued the corporation, requesting injunctive relief as well as actual and exemplary damages. The officers argued, among other things, that the *cy pres* doctrine prevented the dissolution of the corporation and distribution of its assets. The trial court granted injunctive relief for the members. The officers appealed, arguing that the trial court erred in not applying the *cy pres* doctrine. The appeals court held that the trial court did not err because the *cy pres* doctrine only applies in connection with a public charity, not to a private organization with a limited number of members.[221]

C. Constructive Trust

In *Sever v. Massachusetts Mutual Life Insurance*,[222] the court held that the imposition of a constructive trust on life insurance proceeds was proper when the decedent failed to comply with the order in his divorce decree to acquire an insurance policy naming his child as the beneficiary.[223] The decedent named his wife as beneficiary of his life insurance policy, but failed to change the designation after their divorce. The decedent had named no contingent beneficiary. The decedent apparently discussed changing the designation with his agent, but he never signed a new beneficiary designation form. In the divorce decree, the court ordered the decedent to purchase a $50,000 policy naming the child as the beneficiary. The divorce decree also awarded the decedent all existing policies on his life. The decedent never purchased the $50,000 policy for his daughter. The decedent was unmarried at the time of his death and he apparently died intestate. No administration of the decedent's estate was pending when the insurance company filed its interpleader action. The trial court imposed a constructive trust for the benefit of the daughter

218. *See id.* at 323.
219. 929 S.W.2d 532 (Tex. App.—Houston [1st Dist.] 1996, writ denied).
220. *See id.* at 538.
221. *See id.*
222. 944 S.W.2d 486 (Tex. App.—Amarillo 1997, writ denied).
223. *See id.* at 492.

over the proceeds to the extent of $50,000 and awarded the remaining proceeds to the decedent's ex-wife. The daughter, through her attorney *ad litem*, appealed, contending that the trial court improperly awarded the bulk of the insurance proceeds to her mother, the decedent's ex-wife, and in imposing a constructive trust, rather than a legal trust, over $50,000 of the proceeds. The appeals court held that no evidence existed that the decedent redesignated his ex-wife as beneficiary of the policy after their divorce so that all policy proceeds other than the $50,000 and amounts paid in attorney's fees inured to the estate of the decedent.[224] The court held that the imposition of a constructive trust, rather than a legal trust, was appropriate since no evidence existed that the daughter's mother was unsuitable to serve as constructive trustee.[225]

VIII. LEGISLATIVE UPDATE

A. WILLS

The Legislature added new Probate Code section 58b to provide that, except for certain close family relationships, bequests or devises to the attorney who prepared or supervised the preparation of a will, or to an heir or employee of the attorney who prepared or supervised the preparation of a will, are void.[226] The Legislature amended Probate Code section 69(a) to clarify that a bequest to a former spouse will be read as if the spouse predeceased the testator.[227]

B. ESTATE ADMINISTRATION

1. Probate Courts

The Legislature attempted to clarify that county courts at law exercising probate jurisdiction are not statutory probate courts unless chapter 25 of the Government Code[228] designates the court as a statutory probate court.[229] The Legislature amended Probate Code section 5A(b) in an attempt to clarify what actions are appertaining to or incident to an

224. *See id.* at 490-91.

225. *See id.* at 492. The court noted that the mother had preference to serve as guardian for the child if a guardianship were necessary. *See id.*

226. *See* Act of May 30, 1997, 75th Leg., R.S., ch. 1054, § 1, 1997 Tex. Sess. Law Serv. 4016, 4016 (Vernon) (codified at TEX. PROB. CODE ANN. § 58b (Vernon Supp. 1998)).

227. *See* § Act of May 22, 1997, 75th Leg., R.S., ch. 1302, § 5, 1997 Tex. Sess. Law Serv. 4954, 4955-56 (Vernon) (codified as amended at TEX. PROB. CODE ANN. § 69(a) (Vernon Supp. 1998)).

228. TEX. GOV'T CODE ANN. §§ 25.0173, 25.0591, 25.0631, 25.0731, 25.1031, 25.2221, 25.2291 (Vernon Supp. 1998).

229. *See* Act of Apr. 28, 1997, 75th Leg., R.S., ch. 52, § 1, 1997 Tex. Sess. Law Serv. 121, 121 (Vernon) (codified as amended at TEX. PROB. CODE ANN. § 3(ii) (Vernon Supp. 1998)). *See also id.* § 2, 1997 Tex. Sess. Law Serv. at 121-22 (Vernon) (codified as amended at TEX. PROB. CODE ANN. § 601(29) (Vernon Supp. 1998)) (relating to guardianship estates).

estate.[230]

2. *Applications for Probate*

The social security numbers of the applicant and the decedent are no longer necessary for applications for letters testamentary[231] and letters of administration.[232] The Legislature provided, however, that the court may request the applicant to furnish the court with his or her social security number or other identifying information, which will be retained by the court and not made a part of the file.[233] Interestingly, the requirement for inclusion of the applicant's and decedent's social security numbers remains for a muniment of title application.[234] The Legislature adopted the requirements for the contents of the application for probate as a muniment of title[235] and the proof required for probate as a muniment of title.[236] An application for the appointment of a temporary administrator must include all information required for an application for letters testamentary, if the decedent died testate, or an application for letters of administration, if the decedent died intestate.[237]

C. Creditors and Exempt Property

The Legislature has provided that an unsecured creditor must give notice to an independent executor within 120 days after the date on which the creditor received notice of the appointment of the independent executor[238] and clarified how both secured and unsecured creditors are to give notice to independent executors.[239] A personal representative may now abandon worthless or burdensome property of the estate, and a secured creditor may foreclose on the property without further order of the court.[240] The Legislature amended Probate Code sections 281[241] and

230. *See* Act of May 22, 1997, 75th Leg., R.S., ch. 1302, § 1, 1997 Tex. Sess. Law Serv. 4954, 4954 (Vernon) (codified as amended at Tex. Prob. Code Ann. § 5A(b) (Vernon Supp. 1998)).

231. *See* Act of May 22, 1997, 75th Leg., R.S., ch. 1302, § 6, 1997 Tex. Sess. Law Serv. 4954, 4956 (Vernon) (codified as amended at Tex. Prob. Code Ann. § 81 (Vernon Supp. 1998)).

232. *See id.* § 7, 1997 Tex. Sess. Law Serv. at 4956 (Vernon) (codified as amended at Tex. Prob. Code Ann. § 82 (Vernon Supp. 1998)).

233. *See id.* § 3, 1997 Tex. Sess. Law Serv. at 4955 (codified at Tex. Prob. Code Ann. § 36(b) (Vernon Supp. 1998)).

234. *See* Act of May 19, 1997, 75th Leg., R.S., ch. 540, § 1, 1997 Tex. Sess. Law Serv. 1907, 1907-09 (Vernon) (codified at Tex. Prob. Code Ann. § 89A (Vernon Supp. 1998)).

235. *See id.*

236. *See id.* (codified at Tex. Prob. Code Ann. § 89B (Vernon Supp. 1998)). Former Tex. Prob. Code Ann. § 89A has become Tex. Prob. Code Ann. § 89C.

237. *See id.* § 2, 1997 Tex. Sess. Law Serv. at 1909 (codified as amended at Tex. Prob. Code Ann. § 131A (Vernon Supp. 1998)).

238. *See* Act of May 22, 75th Leg., R.S., ch. 1302, § 8, 1997 Tex. Sess. Law Serv. 4954, 4957 (Vernon) (codified at Tex. Prob. Code Ann. § 146(d) (Vernon Supp. 1998)).

239. *See id.* (codified at Tex. Prob. Code Ann. § 146(e) (Vernon Supp. 1998)).

240. *See id.* § 9, 1997 Tex. Sess. Law Serv. at 4957 (codified at Tex. Prob. Code Ann. § 234(a)(6) (Vernon Supp. 1998)).

241. *See id.* § 10, 1997 Tex. Sess. Law Serv. at 4957 (codified as amended at Tex. Prob. Code Ann. § 281 (Vernon Supp. 1998)).

290[242] to provide that exempt property shall be liable only for Class 1 claims and the family allowance shall be paid in preference to all claims except Class 1 claims. The Legislature has clarified the procedures for handling secured claims, including court-ordered sales of the property subject to the secured claims.[243] Funeral expenses and expenses of last illness may now total fifteen thousand dollars rather than five thousand dollars.[244]

D. Dependent Administrations

The annual account[245] and final account[246] of a dependent personal representative must affirmatively state that the personal representative has paid all required bond premiums.

E. Miscellaneous Amendments

The Legislature repealed the informal probate provisions[247] and recodified the emergency intervention procedures.[248] A small estate affidavit must now include sufficient family history facts to establish the heirship rights of the distributees.[249] A party to a will contest or other proceeding in which the decedent's mental or testamentary capacity is an issue may obtain relevant medical records relating the decedent's capacity.[250] Citation of service in an heirship proceeding must be made to all heirs age twelve and older, but may be made to the parent, managing conservator, or guardian of an heir under twelve years of age.[251] The legislature expanded the provisions for payment or transfer on death to apply to secur-

242. *See id.* § 11, 1997 Tex. Sess. Law Serv. at 4957-58 (codified as amended at TEX. PROB. CODE ANN. § 290 (Vernon Supp. 1998)).

243. *See id.* § 13, 1997 Tex. Sess. Law Serv. at 4958-59 (codified as amended at TEX. PROB. CODE ANN. § 306(e)(3), (f), (i) (Vernon Supp. 1998)).

244. *See* Act of May 26, 1997, 75th Leg., R.S., ch. 1361, § 1, 1997 Tex. Sess. Law Serv. 5112, 5112 (Vernon) (codified as amended at TEX. PROB. CODE ANN. § 320(a)(1) (Vernon Supp. 1998)) (relating to order of payment of claims); *see id.* § 2, 1997 Tex. Sess. Law Serv. at 5112 (codified as amended at TEX. PROB. CODE ANN. § 322 (Vernon Supp. 1998)) (defining Class 1 claims).

245. *See* Act of May 29, 1997, 75th Leg., R.S., ch. 1403, § 1, 1997 Tex. Sess. Law Serv. 5260, 5260-61 (Vernon) (codified at TEX. PROB. CODE ANN. § 399(a)(9) (Vernon Supp. 1998)).

246. *See id.* § 2, 1997 Tex. Sess. Law Serv. at 5261 (codified as amended at TEX. PROB. CODE ANN. § 405 (Vernon Supp. 1998)).

247. *See* Act of May 19, 1997, 75th Leg., R.S., ch. 540, § 5, 1997 Tex. Sess. Law Serv. 1907, 1910 (Vernon), repealing Act of May 29, 1993, 73rd Leg., R.S., ch. 712, §7, 1993 Tex. Gen. Laws 2792, 2792-96.

248. *See* Act of May 12, 1997, 75th Leg., R.S., ch. 199, § 1, 1997 Tex. Sess. Law Serv. 1066, 1066-68 (Vernon) (codified at TEX. PROB. CODE ANN. §§ 108-115 (Vernon Supp. 1998)).

249. *See* Act of May 19, 1997, 75th Leg., R.S., ch. 540, § 3, 1997 Tex. Sess. Law Serv. 1907, 1909-10 (Vernon) (codified as amended at TEX. PROB. CODE ANN. § 137(a)(5) (Vernon Supp. 1998)).

250. *See* Act of May 22, 1997, 75th Leg., R.S., ch. 1302, § 2, 1997 Tex. Sess. Law Serv. 4954, 4955 (Vernon) (codified at TEX. PROB. CODE ANN. § 10B (Vernon Supp. 1998)).

251. *See* Act of May 28, 1997, 75th Leg., R.S., ch. 1130, § 1, 1997 Tex. Sess. Law Serv. 4284, 4284 (Vernon) (codified as amended at TEX. PROB. CODE ANN. § 50(a) (Vernon Supp. 1998)). Citation by publication is proper for persons or entities whose addresses are

ities and accounts at financial institutions.[252]

F. GUARDIANSHIPS

The Legislature amended Probate Code section 663 to require that notice of a guardianship application be provided to a person designated as guardian of the proposed ward in the event of later need, a person designated as guardian in a probated will of the parent of the proposed ward, or a person designated as guardian of the proposed ward in a writing executed by the proposed ward's last surviving parent.[253] The application for guardianship no longer needs to include the social security numbers of the applicant and proposed ward,[254] but the court, for its own records, may ask the applicant for his or her social security number or other identifying information.[255] If a court appoints the Department of Protective and Regulatory Services as guardian, a representative of the department shall take the guardian's oath.[256] The Legislature has provided guidance to the courts on the types of bonds and the considerations in determining the types and amounts of bonds of guardians of the person.[257]

The guardian's annual account[258] and final account[259] must now affirmatively state that all bond premiums have been paid. The guardian must also include in the final account information about the tax returns filed and taxes owed and paid during the guardianship, as well as any current delinquencies in filing tax returns and paying taxes.[260] The guardian may abandon worthless or burdensome property, and a secured creditor may foreclose on the abandoned property without further court action.[261] A court may now order a guardian "to expend guardianship funds for the

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unknown, as well as on unknown heirs. *See id.* at 4285 (codified as amended at TEX. PROB. CODE ANN. § 50(b) (Vernon Supp. 1998)).

252. *See* Act of May 22, 1997, 75th Leg., R.S., ch. 1302, § 14, 1997 Tex. Sess. Law Serv. 4954, 4959 (Vernon) (codified as amended at TEX. PROB. CODE ANN. § 450(a) (Vernon Supp. 1998)).

253. *See* Act of Apr. 29, 1997, 75th Leg., R.S., ch. 77, § 2, 1997 Tex. Sess. Law Serv. 158, 159 (Vernon) (codified at TEX. PROB. CODE ANN. § 633(d)(5), (6), (7) (Vernon Supp. 1998)).

254. *See id.* § 5, 1997 Tex. Sess. Law Serv. at 159 (codified as amended at TEX. PROB. CODE ANN. § 682(3) (Vernon Supp. 1998)).

255. *See id.* § 3, 1997 Tex. Sess. Law Serv. at 159 (codified at TEX. PROB. CODE ANN. § 671(e) (Vernon Supp. 1998)).

256. *See* Act of May 31, 1997, 75th Leg., R.S., ch. 1022, § 101, 1997 Tex. Sess. Law Serv. 3733, 3777 (Vernon) (codified at TEX. PROB. CODE ANN. § 700(b) (Vernon Supp. 1998)).

257. *See* Act of May 25, 1997, 75th Leg., R.S., ch. 924, § 2, 1997 Tex. Sess. Law Serv. 2918, 2919 (Vernon) (codified at TEX. PROB. CODE ANN. § 702A (Vernon Supp. 1998)).

258. *See* Act of May 29, 1997, 75th Leg., R.S., ch. 1403, § 3, 1997 Tex. Sess. Law Serv. 5260, 5262-63 (Vernon) (codified as amended at TEX. PROB. CODE ANN. § 743(b)(14) (Vernon Supp. 1998)).

259. *See id.* § 4, 1997 Tex. Sess. Law Serv. at 5263 (codified as amended at TEX. PROB. CODE ANN. § 749(5) (Vernon Supp. 1998)).

260. *See id.* (codified as amended at TEX. PROB. CODE ANN. § 749(6), (7), (8), (9) (Vernon Supp. 1998)).

261. *See* Act of Apr. 29, 1997, 75th Leg., R.S., ch. 77, § 6, 1997 Tex. Sess. Law Serv. 158, 160-61 (Vernon) (codified at TEX. PROB. CODE ANN. § 774(a)(6) (Vernon Supp. 1998)).

education and maintenance of the ward's spouse or dependent."[262] The Legislature has provided that a guardian shall give the highest priority to the payment of a claim relating to the guardianship administration.[263] A guardian may invest in the Texas Tomorrow Fund for a minor ward's education.[264] The Legislature has added parties to receive notice if the guardian makes an application to make a tax-motivated gift on behalf of the ward to include the beneficiaries under a trust or other beneficial instrument, and the applicant must provide notice of the application to all beneficiaries under the ward's will or other beneficial instrument, including the ward's spouse, the ward's dependents, and any other person specified by the court.[265]

The Legislature amended the provisions relating to management trusts[266] and added provisions relating to the appointment and duties of a receiver for persons thought to be prisoners of war or missing in action.[267] The Legislature also amended Probate Code section 887 to provide that up to $50,000 may be paid into the registry of the court for an incapacitated person without a legal guardian,[268] and provided for delivery to the registry of the court a minor's interest in real or personal property if the interest does not exceed $50,000 in value.[269] The Legislature added a provision for the guardian's sale of property of a ward subject to a guardianship of the person, but not a guardianship of the estate, if the property does not exceed $50,000 in value, and for delivery of the proceeds to the registry of the court.[270]

G. TRUSTS

The Legislature amended Property Code section 112.035[271] to add new subsection (e), which provides that a beneficiary of a trust will not become a grantor of the trust merely by waiving, releasing, or allowing the

262. *See id.* § 7, 1997 Tex. Sess. Law Serv. at 161 (codified at TEX. PROB. CODE ANN. § 776A (Vernon Supp. 1998)).

263. *See* Act of May 29, 1997, 75th Leg., R.S., ch. 1403, § 5, 1997 Tex. Sess. Law Serv. 5260, 5263 (Vernon) (codified at TEX. PROB. CODE ANN. § 805(b) (Vernon Supp. 1998)).

264. *See* Act of May 15, 1997, 75th Leg., R.S., ch. 434, § 1, 1997 Tex. Sess. Law Serv. 1702, 1702 (Vernon) (codified as amended at TEX. PROB. CODE ANN. § 856(a) (Vernon Supp. 1998)).

265. *See* Act of Apr. 29, 1997, 75th Leg., R.S., ch. 77, § 9, 1997 Tex. Sess. Law Serv. 158, 160-62 (Vernon) (codified as amended at TEX. PROB. CODE ANN. § 865(a)(2), (3), (e) (Vernon Supp. 1998)).

266. *See* Act of May 26, 1997, 75th Leg., R.S., ch. 1375, §§ 1-4, 1997 Tex. Sess. Law Serv. 5162, 5162-63 (Vernon) (codified as amended at TEX. PROB. CODE ANN. §§ 867-870 (Vernon Supp. 1998)).

267. *See* Act of April 3, 1997, 75th Leg., R.S., ch. 7, § 2, 1997 Tex. Sess. Law Serv. 8, 41-43 (codified as TEX. PROB. CODE ANN. §§ 886, 886A-886F (Vernon Supp. 1998)).

268. *See* Act of May 12, 1997, 75th Leg., R.S., ch. 295, § 1, 1997 Tex. Sess. Law Serv. 1314, 1314-15 (codified as amended at TEX. PROB. CODE ANN. §§ 887(a), (e) (Vernon Supp. 1998)).

269. *See id.* § 2, 1997 Tex. Sess. Law Serv. at 1315 (codified as amended at TEX. PROB. CODE ANN. § 889(a) (Vernon Supp. 1998)).

270. *See id.* § 4, 1997 Tex. Sess. Law Serv. at 1315 (codified as TEX. PROB. CODE ANN. § 890 (Vernon Supp. 1998)).

271. TEX. PROP. CODE ANN. § 112.035 (Vernon Supp. 1998).

lapse of a Crummey demand right.[272] Trustees will now have the same protection from federal environmental laws as allowed under federal law[273] due to an addition to Property Code section 114.001.[274] The Legislature amended Property Code section 115.001(d) to provide jurisdiction for a court that creates an 867 Trust.[275]

H. Miscellaneous Provisions

1. *Property Code Provisions*

The Legislature amended the Uniform Transfers to Minors Act to clarify that donors make may contributions to Uniform Gifts to Minors Accounts that existed prior to the passage of the Uniform Transfers to Minors Accounts Act.[276] The Legislature amended Property Code section 142.005(g) to provide that a court may create a Medicaid special needs trust[277] under section 142.[278]

2. *Disability Planning*

The Legislature revised the durable power of attorney statute to provide a new statutory form, which is only a suggested form.[279] The Legislature clarified that mineral interests fall under the real property powers granted to the attorney in fact[280] and defined retirement plans for purposes of a power of attorney.[281] The Legislature amended witness requirements on directives to physicians[282] and amended the statutory

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272. *See* Act of April 30, 1997, 75th Leg., R.S., ch. 109, § 1, 1997 Tex. Sess. Law Serv. 208, 208 (Vernon) (codified at Tex. Prop. Code Ann. § 112.035(e) (Vernon Supp. 1998)).

273. *See* 42 U.S.C. § 9607(n) (1994).

274. *See* Act of May 12, 1997, 75th Leg., R.S., ch. 263, § 1, 1997 Tex. Sess. Law Serv. 1213, 1213 (Vernon) (codified at Tex. Prop. Code Ann. § 114.001(e) (Vernon Supp. 1998)).

275. *See* Act of May 26, 1997, 75th Leg., R.S., ch. 1375, § 5, 1997 Tex. Sess. Law Serv. 5162, 5163 (Vernon) (codified as amended at Tex. Prop. Code Ann. § 115.001(d) (Vernon Supp. 1998)).

276. *See* Act of May 7, 1997, 75th Leg., R.S., ch. 221, § 2, 1997 Tex. Sess. Law Serv. 1127, 1128 (Vernon) (codified as amended at Tex. Prop. Code Ann. § 141.025 (editorially redesignated) (Vernon Supp. 1998)).

277. *See* 42 U.S.C. § 1396p(d)(4)(A) (1994).

278. *See* Act of May 2, 1997, 75th Leg., R.S., ch. 128, § 1, 1997 Tex. Sess. Law Serv. 250, 250 (Vernon) (codified as amended at Tex. Prop. Code Ann. § 142.005(g) (Vernon Supp. 1998)).

279. *See* Act of May 16, 1997, 75th Leg., R.S., ch. 455, § 4, 1997 Tex. Sess. Law Serv. 1752, 1753-56 (Vernon) (codified as amended at Tex. Prob. Code Ann. § 490 (Vernon Supp. 1998)). The legislature also provided for the automatic revocation of a power of attorney given to a spouse upon divorce. *See id.* § 1, 1997 Tex. Sess. Law Serv. at 1752 (codified at Tex. Prob. Code Ann. § 485A (Vernon Supp. 1998)).

280. *See id.* § 5, 1997 Tex. Sess. Law Serv. at 1756 (codified at Tex. Prob. Code Ann. § 492(4)(E) (Vernon Supp. 1998)).

281. *See id.* § 6, 1997 Tex. Sess. Law Serv. at 1757 (codified at Tex. Prob. Code Ann. § 503(b) (Vernon Supp. 1998)).

282. *See* Act of May 13, 1997, 75th Leg., R.S., ch. 291, § 1, 1997 Tex. Sess. Law Serv. 1305, 1305-06 (Vernon) (codified as amended at Tex. Health & Safety Code Ann. § 672.003(c) (Vernon Supp. 1998)).

form.[283] A person not incapacitated may now, by completing a mandatory statutory form, declare his or her wishes concerning treatment if he or she later becomes incapacitated.[284]

283. *See id.* § 2, 1997 Tex. Sess. Law Serv. at 1306-07 (codified as amended at TEX. HEALTH & SAFETY CODE ANN. § 672.004 (Vernon Supp. 1998)).

284. *See* Act of May 23, 1997, 75th Leg., R.S., ch. 1318, § 1, 1997 Tex. Sess. Law Serv. 4995, 4995-5000 (Vernon) (codified at TEX. CIV. PRAC. & REM. CODE ANN. §§ 137.001-137.011 (Vernon Supp. 1998)).